Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-500

J. W. BROWN ..... *Petitioner*

VS.

THE HENRY SMILEY ESTATE
J. C. DANLEY, ADM'T ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF

L. T. SIMES II
Attorney at Law
State of Arkansas
332 N. Sebastian
West Helena, Arkansas 72390

MIKE J. ETOCH
Attorney at Law
State of Arkansas
727 Cherry Street
Helena, Arkansas 72342

Attorneys for Petitioner

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

SUBJECT INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED 4

TABLE OF AUTHORITIES CITED

CASES:

Commonwealth, ex rel Savruk v. Derby, 235 Pa. Super. 560, 344 A.2d 624 (1975) 5

Davis v. Davis, 521 S.W.2d 603 (Tex. Sup. Ct. 1975) 5

In Re L. 499 S.W.2d 490 (Mo. 1973) 5

Serafin v. Serafin, 258 N.W.2d 461 (Mich. 1977) 5

Ventresco v. Bushey, 159 Me. 241, 249, 191 A.2d 104 (1963) 5

U. S. CONSTITUTION AND STATUTES:

U. S. Constitution, Amendment V 3

U. S. Constitution, Amendment XIV 3

Arkansas Statute Annotated, Section 61-141 (Supp. 1969) (Repl. 1971), Vol. 5A, pp. 224-245 2

OTHER:

Bell, Competency of a husband and wife to testify as as to Non-Access, 21 Temp. L. O. 217 (1947) 5

McCormick on Evidence 2d Ed. 67 5

7 Wigmore on Evidence (3d Ed.) 2063, 2064 5

The "Lord Mansfield Rule" as to "Bastardizing the Issue." 3 Md. L. Rev. 79 6

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-500

J. W. BROWN ..... *Petitioner*

VS.

THE HENRY SMILEY ESTATE
J. C. DANLEY, ADM'T ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF

Petitioner, J. E. Brown, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas, entered in this proceeding on May 22, 1978 (Petition for Rehearing denied June 26, 1978) affirming the decision of the lower court.

OPINION BELOW

The opinion of the Arkansas Supreme Court, a copy of which is set forth as Appendix "A" to this Petition, is reported as 263 Ark. 480, 566 S.W.2d, p. 385. The Arkansas Supreme Court practice is not to issue formal opinions or notices of denial of Petition for Rehearing. Petition for Rehearing denied June 26, 1978.

JURISDICTION

The judgment of the Arkansas Supreme Court which is sought to be reviewed was entered on May 22, 1978. On June 26, 1978, the Arkansas Supreme Court denied Petitioner's Petition for Rehearing of the case. The present Petition for Writ of Certiorari is being filed within the ninety (90) days of the aforementioned Order.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether or not the Arkansas Statute 61-141(b) and (d) is unconstitutional as a denial of Equal Protection and Due Process.

2. Whether the Trimble v. Gordon case overruled the Bell v. Bell case, and Arkansas Statute 61-141(b) and (d) by implication, and whether the Arkansas Supreme Court failed to apply and misconstrued the Trimble v. Gordon decision of this Court.

3. Whether the Lord Mansfield Rule, which prohibits the testimony of the mother as to non-access presents an impenetrable barrier, is unduly burdensome and effectively denies Petitioner equal access to the Judicial System, Equal Protection and Due Process.

4. Finally, the question is whether the Lord Mansfield Rule, which appears to be racially neutral on its face, is an instance of covert racial discrimination because it does, in fact, operate far more severely upon Negroes as a class than it does upon whites.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

REPLY ARGUMENT

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

First I would like to clarify two errors in the respondent's statement of the case. On page 5 therein he states claimant's mother was three (3) months pregnant at the time she married J. W. Brown, Sr., the evidence clearly shows they were married on May 8th and the child was born four (4) months later on September 17, 1937. Page 21 or 53 transcript.

Also, on page 5 in the statement of the case respondent says the claimant lived with John W. Brown, Sr., until his death, when in fact, he never did live with John W. Brown, Sr., but was raised by his maternal grandparents from birth. Pages 109 and 77 of the transcript.

It is claimant's contention that the Lord Mansfield Rule is outdated and that it unconstitutionally deprives him of his property without due process and without equal protection of the law. In these days and times with jet planes and fast cars the old idea of non-access is certainly not applicable. This, however, is a minor consideration because the duty of the law is to seek the truth, not to conceal it and to apply the Mansfield Rule is to shut out of evidence the only two people who can provide the court with the truth. The question squarely before this Court, on this Writ, is whether or not in these changing times, where an illegitimate child is no longer to be punished for his parents' transgressions, does it violate his constitutional rights to hide the truth behind an Ancient Rule of Evidence that will not let the parties to the transaction testify about what took place.

The presumption of legitimacy is as strong a presumption as the presumption of innocence in a criminal case.

Both have to be overcome by clear and convincing proof. Could this Court imagine a Rule in Criminal Law that says the defendant, cannot testify at his own trial? The claimant does not know the circumstances under which he was conceived and cannot testify to such and the Lord Mansfield Rule says his father and mother cannot testify. As a result of the rule he cannot reach the truth and therefore is deprived of his birth rights, all of which I submit unconstitutionally violates his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

In support of petitioner's contention that Lord Mansfield's Rule is unconstitutional the petitioner would cite the following cases from Michigan, Texas, Maine, Pennsylvania and Missouri, declaring it unconstitutional and to have outlived its usefulness:

Serafin v. Serafin, 258 N.W.2d 461 (Mich. 1977);

Ventresco v. Bushey, 159 Me. 241, 191 A. 2104 (1963);

Davis v. Davis, 521 S.W.2d 603 (Tex. 1975);

Commonwealth, ex rel. Savruk v. Derby, Pa. Super. 560, 344 A.2d 624 (1975)

In re L, 499 S.W.2d 490 (Mo. 1973).

In addition thereto such notable authors as:

McCormick, Evidence, 2d page 67;

7 Wigmore, Evidence, 3d 2063 & 2064

have steadfastly condemned the Mansfield Rule as unjustifiable.

And the following Law Review Articles have done likewise:

Bell, Competency of Husband and Wife to testify to Non-Access, 21 Temple L.O. 217 (1947);

The Lord Mansfield Rule as to Bastardizing the Issue, 3 Md. L. Rev. 79.

In conclusion I would cite the following passage from *Davis v. Davis,* 507 S.W.2d 841 at 347 (Tex. 1974):

> "If the function of a court is to find the truth of a matter so that justice might be done, then a rule which absolutely excludes the best possible evidence of a matter in issue rather than allow it to be weighed by the trier of fact must necessarily lead to injustice. Further, when a court voluntarily blindfolds itself to what every citizen can see, the public must justifiably question the administration of law to just that extent."

The Supreme Court took great strides in *Trimble v. Gordan,* 430 U.S. 762 (1977) to give illegitimate children Equal Protection of the law under the Fourteenth Amendment. It is now the duty of this Great Court to take one more giant stride and to do away with the Mansfield Rule of Evidence that deprives them of the right to use the best evidence available to acquire these rights just given them.

Respectfully submitted,

L. T. Simes II
Attorney at Law
State of Arkansas
332 N. Sebastian
West Helena, Arkansas 72390

Mike J. Etoch
Attorney at Law
State of Arkansas
727 Cherry Street
Helena, Arkansas 72342

Attorneys for Petitioner